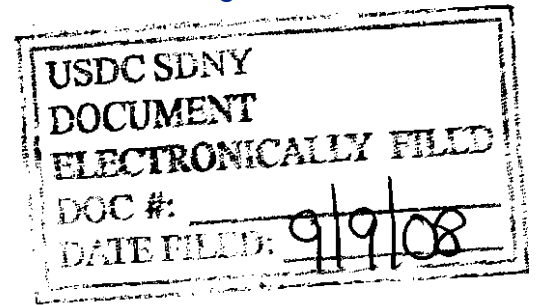


UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



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DOUGLAS KINSEY,

Plaintiff,

04 Civ. 582

-against-

OPINION

CENDANT CORPORATION, FAIRFIELD  
RESORTS INC., and FFD DEVELOPMENT  
COMPANY, L.L.C.,

Defendants.

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A P P E A R A N C E S:

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**Sweet, D.J.**

Defendants Cendant Corporation ("Cendant"), Fairfield Resorts, Inc. ("Fairfield") and FFD Development Company, LLC ("FFD") (collectively, the "Defendants") have moved under Rule 56, Fed. R. Civ. P. for summary judgment to dismiss the claims of plaintiff Douglas Kinsey ("Kinsey" or the "Plaintiff") alleging negligent misrepresentation and negligence. On the findings and conclusions set forth below, the motion is granted as to Cendant and Fairfield and denied as to FFD.

The controversy over the expiration date of stock options between Kinsey, a former employee of Fairfield and FFD, and the Defendants has been hard fought. The difficulties of the relationship result from changes in corporate form and Kinsey's employment first at Fairfield, then FFD, then Fairfield again and finally with a competitor of the Defendants. Because no duty of care has been established with respect to Fairfield and Cendant in connection with the claimed negligent misrepresentation and negligence, dismissal of the claims against them is appropriate. Because there are factual issues as to the claims against FFD, summary judgment is not appropriate.

## **I. PRIOR PROCEEDINGS**

The Defendants have previously made successful motions to dismiss and for summary judgment on all counts in the Amended Complaint with the exception of Counts 6 (Negligence) and 7 (Negligent Misrepresentation). See Kinsey v. Cendant Corp., No. 04 Civ. 0582, 2004 WL 2591946 (S.D.N.Y. Nov. 16, 2004); Kinsey v. Cendant Corp., 521 F. Supp. 2d 292 (S.D.N.Y. 2007). Since the Court's November 6, 2007 Opinion, the parties have engaged in an unsuccessful mediation of the remaining claims.

The instant motion was heard and marked fully submitted on March 26, 2008.<sup>1</sup>

## **II. THE FACTS**

The facts are set forth in Defendants' Local Rule 56.1 Statement and Plaintiff's Response and Statement of Additional

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<sup>1</sup>A scheduling order of October 12, 2006, required that all motions be submitted by April 12, 2007. A subsequent scheduling order was entered on January 24, 2008, providing for completion of discovery and the filing of in limine motions. Kinsey has contended that the Defendants' motion is untimely under the Court's Order of October 12, 2006 (the "October Order"), and argues that Rule 6(b), Fed. R. Civ. P. bars the Defendants' motion. However, Rule 6(b) embodies an "elastic concept" affording district courts the discretion to enlarge the time allowed for motions in appropriate circumstances. See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 391-92 (1993). Even if the instant motion is untimely, the Court may, in its discretion, hear the motion in order to narrow the issues for trial. The motion will therefore be considered on its merits.

Material Facts and attached affidavits, and are not in dispute except as noted below.

Kinsey is a former at-will employee of defendants Fairfield and FFD. He holds a bachelor's degree in finance granted by Western Carolina University in 1983.

Fairfield issued Kinsey stock options under its 1997 Stock Option Plan ("Option Plan") pursuant to the terms of an Option Agreement between Kinsey and Fairfield, effective May 22, 1997 ("Option Agreement"). The stock options issued to Kinsey were exercisable within ten years of issuance, i.e. by May 21, 2007. However, if Kinsey ceased to be an employee of Fairfield or its subsidiary for any reason other than death or discharge for cause (or resignation in anticipation of discharge for cause), he could exercise any vested options only during the ninety calendar days following the termination of his employment.

In April, 2001, Cendant acquired Fairfield pursuant to a merger and assumed outstanding and unexercised options issued pursuant to the Plan. In conjunction with the Merger, options issued pursuant to the Plan, including Kinsey's, automatically became fully vested and were converted to options to purchase

shares of Cendant common stock. Upon Cendant's acquisition of Fairfield, Kinsey's Fairfield stock options were therefore converted into options to purchase 33,918 shares of Cendant common stock at a "strike" price of \$8.85 per share. The Cendant Statement of Stock Option Award issued to Kinsey lists as the options' expiration date May 21, 2007.

FFD was formed in connection with the transaction between Fairfield and Cendant, and Kinsey became employed by FFD on or about April 2, 2001. According to Kinsey, the employment by FFD was a transfer, not a termination of employment at Fairfield. However, this issue was resolved by the Court's November 6, 2007 Opinion, which held that "[t]he contention by Kinsey that he was 'transferred,' not 'terminated,' is rejected as semantic and insufficient to create a genuine issue of material fact." 521 F. Supp. 2d at 306.

On March 21, 2001, the Fairfield Board of Directors passed a resolution that stated, with regard to options granted under the Fairfield 1997 Stock Plan:

if the Optionee's employment with the Company or Cendant or any of their respective Subsidiaries is terminated in connection with the Optionee becoming employed by FFD Development Company, LLC or its Subsidiaries, the period during which the Optionee may exercise the Option after the Optionee's employment with the Company or Cendant

or any of their respective Subsidiaries has been terminated will be the longer of the period set forth in the related option agreement or the date that is one year after the date during which the Effective Time occurred; provided, however, if the Optionee's employment with FFD Development Company, LLC or its Subsidiaries is terminated voluntarily by the Optionee, the period during which the Option will be exercisable will be the period stated in the related option agreement commencing from the date the Optionee's employment with FFD Development Company, LLC or its Subsidiaries was terminated.

Cendant sent a notice to Kinsey informing him that his stock options would expire ninety days after the acquisition. On July 3, 2001, Defendants informed Kinsey that the notice that his stock options would expire ninety days after the acquisition was sent to Kinsey in error. Gregory Bendlin, Vice President, General Counsel and Secretary of FFD ("Bendlin"), later confirmed in an email that the stock options of former Fairfield employees who became FFD employees, including Kinsey, had not expired. Bendlin stated that as part of the merger, Fairfield's Board of Directors and Compensation Committee amended the 1997 Stock Option Plan "to provide that continued employment at FFD would count as continued employment under the option plan and the 90 day exercise period would not apply once the optionees were no longer Fairfield employees." Bendlin made no mention of any one-year period.

On or about August 13, 2001, Bendlin once again advised Kinsey, by email, that the options of Kinsey and another similarly situated employee, Brian Keller, had "not expired because of the special provisions made for the Fairfield employees (Brain and Doug) who transferred to FFD," and in so doing re-transmitted his July 3, 2001 email advising Kinsey that "continued employment at FFD would count as continued employment under the" Plan.

On August 14, 2001, Geri Fitterman, the stock option manager at Cendant sent an email regarding certain of Kinsey's stock options ("Awarded Options") to Bendlin. Attached to the August 14 email was a Grant Detail Report, which showed the expiration date of the Awarded Options to be April 1, 2002. The August 14 email stated that Kinsey could "access information about [his] options by contacting Merrill Lynch at 1-800-677-9405."

Bendlin responded to Fitterman the same day, stating that although the Grant Detail Report indicated an expiration date of April 1, 2002, for the Awarded Options, he believed that the expiration date might actually be the "longer of one year from 4/2/01 or the term set forth in the relevant option agreement." Bendlin asked Fitterman in the same email: "After

your office has had a chance to look into this, would you mind letting me know whether 4/1/02 is the correct expiration date."

Kinsey was aware of the representation made in the August 13 emails concerning the expiration date of the options. Kinsey has maintained that he received oral representations from Bendlin that the 10-year term applied.

Bendlin acknowledged, in an August 14, 2001 email to Fitterman that Kinsey and Keller were similarly situated in relation to the period in which they were to exercise their converted stock options, which he referred to as "Fairfield Options." Bendlin's email requested: "After your office has had a chance to look into this, would you mind letting me know whether 4/1/02 is the correct expiration date. Then, I can inform Brian and Doug so the matter can be put to rest." Kinsey received and reviewed a copy of the August 14 email.

Kinsey became employed by Fairfield again on or about October 8, 2001.

On October 29, 2001, five months before the April 1, 2002 expiration date, Bendlin sent Kinsey another email, which stated: "My understanding is that you are now a Fairfield



employee again. You should probably confirm with Fairfield HR that your converted Fairfield options are still in effect with their original expiration date." The same email chain shows that Kinsey contacted Matt Durfee, Senior Vice President of Human Resources at Fairfield and asked whether he needed "to do anything to preserve [his] existing options." Durfee forwarded Kinsey's request to Roe Sie, Director of Compensation and Benefits who responded directly to Kinsey, informing him that "Geri Fitterman is the only person who can confirm that your original options are still in place, so I'll leave that up to Greg."

According to the Defendants, Kinsey did not contact Fitterman after receiving the October 29 email. According to Kinsey, he had two or three inconclusive verbal communications with Fitterman.

In connection with Cendant's acquisition of Fairfield, Kinsey received an Owners Manual containing information on "keeping track of your stock options," including contact details for Merrill Lynch, the brokerage firm retained by Cendant to provide information and administrative services to employees regarding their Cendant options, and a wallet-sized card reflecting such contact information. Kinsey was aware that

Merrill Lynch had been retained to provide information and administrative services regarding the Awarded Options. Kinsey did not contact Merrill Lynch to obtain information about the expiration date of the Awarded Options.

Kinsey did not experience any gap in employee benefits, such as health insurance, 401(K) benefits or the like, when he transferred from Fairfield to FFD. No COBRA letter was issued to him in connection with the transfer.

Keller, a Fairfield employee who received stock options under the Plan and transferred to FFD upon Cendant's acquisition of Fairfield, and who is similarly situated to Kinsey in all relevant respects, was allowed to exercise his stock options more than one year after his transfer to FFD.

The management of Fairfield, FFD and Cendant did not advise Kinsey, at any time within one year after the acquisition of Fairfield by Cendant that his stock options would expire in less than ten years.

In 2002, FFD was recognized by Defendants as being part of Cendant.

At the time of his resignation from Fairfield in 2003, Kinsey was Senior Vice President of Real Estate Acquisitions. In that position, Kinsey was responsible for significant acquisition and development projects valued at hundreds of millions of dollars, which were expected to result in net sales revenue for Fairfield in the billion-dollar range.

After resigning from Fairfield, Kinsey began working for Bluegreen Corporation ("Bluegreen"), one of Fairfield's competitors. When he joined Bluegreen, it was Kinsey's belief that he was the fourth highest paid executive at the company, which he believed to have a market capitalization of approximately \$600 million.

It was not until April 7, 2003, over a year after his options were said to have expired, that Defendants, through Richard Meisner, a senior counsel in the Cendant Law Department, informed Kinsey of their position that "the information [he was] provided" in relation to the treatment of employment with FFD as continued employment with Fairfield "was not entirely correct."

### **III. THE SUMMARY JUDGMENT STANDARD**

Summary judgment is granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); SCS Commc'ns, Inc. v. Herrick Co., 360 F.3d 329, 338 (2d Cir. 2004). The courts do not try issues of fact on a motion for summary judgment, but, rather, determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).

"The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish [its] right to judgment as a matter of law." Rodriguez v. City of New York, 72 F.3d 1051, 1060-61 (2d Cir. 1995). In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Gibbs-Alfano v. Burton, 281 F.3d 12, 18 (2d Cir. 2002). If there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is

improper. Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994). However, "the non-moving party may not rely simply on conclusory allegations or speculation to avoid summary judgment, but instead must offer evidence to show that its version of the events is not wholly fanciful." Morris v. Lindau, 196 F.3d 102, 109 (2d Cir. 1999) (quotation omitted).

#### IV. DISCUSSION

##### A. The Claims Against Cendant and Fairfield Are Dismissed

To establish a claim for negligence under New York law, a plaintiff must show (1) defendant owed plaintiff a cognizable duty of care; (2) a breach of the duty; and (3) plaintiff suffered damage as a proximate result thereof. Williams v. Utica College of Syracuse Univ., 453 F.3d 112, 116 (2d Cir. 2006); see also Alfaro v. Wal-Mart Stores, Inc., 210 F.3d 111, 114 (2d Cir. 2000).

Kinsey argues that Defendants assumed a duty of care when Bendlin's undertook to ascertain the expiration date of Kinsey's options, and did so with superior knowledge. Memo in Opp. 16-17.

It has been established that Bendlin was an officer of FFD at the time he made the representations which Kinsey alleges that he relied upon. Kinsey has not stated any facts that could cause Fairfield or Cendant to be bound by Bendlin's alleged conduct, given the Court's prior holding that FFD was "a separate and distinct legal entity" at the time the relevant representations were made. November 16, 2007 Decision at 297. The negligence claims against Cendant and Fairfield are therefore dismissed.

To support a claim for negligent misrepresentation, a party must establish "(1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment." Hydro Investors, Inc. v. Trafalgar Power Inc., 227 F.3d 8, 20 (2d Cir. 2000); Brinsights, LLC v. Charming Shoppes of Del., Inc., 06 Civ. 1745 (CM), 2008 WL 216969, at \*7 (S.D.N.Y. Jan. 16, 2008).

Because the allegedly false representations were made by Bendlin, an officer of FFD, while FFD was an independent entity, the negligent misrepresentation claims against Fairfield and Cendant must be dismissed as well.

**B. Disputes of Fact Bar Summary Judgment in Favor of FFD**

FFD is bound by Bendlin's conduct, and questions of fact preclude summary judgment on the questions of whether, through Bendlin's oral and written representations to Kinsey, FFD created a special relationship, assumed a duty of care, and induced Kinsey to reasonably rely on Bendlin's representations for the proposition that his employment by FFD constituted continued employment by Fairfax for the purposes of the Options Plan and Agreement.

The existence of a special relationship is, by necessity, highly fact-specific. Gordon P. Getty Family Trust v. Peltz, 93 Civ. 3162 (DAB), 1998 WL 148425, at \*8 (S.D.N.Y. Mar. 27, 1998). Similarly, "[a]lthough the question of whether a duty exists is a question of law, the question of who has the duty is a question of fact." Doud v. U.S., 797 F. Supp. 138, 147 (N.D.N.Y. 1992). The submissions of the parties are not entirely clear on the subject, but it seems that the March 21,

2001 resolution of the Fairfield Board that was the subject of Bendlin's inaccurate representations to Kinsey was kept confidential by Defendants. If Kinsey did not have access to this key document and relied on Bendlin's interpretation of the document to protect his interests, as well as the content of Bendlin's representations, he may establish the existence of a special relationship and that FFD assumed a duty of care. These issues are therefore inappropriate for resolution by summary judgment.

The question of reasonable reliance is also generally left to the finder of fact. Talansky v. Schulman, 770 N.Y.S.2d 48, 54 (App. Div. 2003). See also Schlaifer Nance & Co. v. Estate of Warhol, 119 F.3d 91, 98 (2d Cir. 1997) ("The question of what constitutes reasonable reliance is always nettlesome because it is so fact-intensive."). FFD asserts that the October 29, 2001 email in which Bendlin stated that Kinsey "should probably confirm with Fairfield HR that [Kinsey's] converted Fairfield options are still in effect with their original expiration date" was a "Red Flag" that precludes a finding of reasonable reliance. Reply Memo. 5. However, the question of whether Kinsey's reliance on Bendlin was reasonable in light of subsequent emails and oral communications is a



question of fact not appropriate for resolution by summary judgment.

These disputes bar summary judgment in favor of FFD.


**Conclusion**

Upon the findings and conclusions set forth above, the motion of Cendant and Fairfield for summary judgment to dismiss the claims of negligence and negligent misrepresentation against them is granted. The motion for summary judgment by FFD is denied.

Motions in limine will be heard on September 24, 2008 or such other date upon which the parties agree.

It is so ordered.

New York, N.Y.  
September 8, 2008

  
ROBERT W. SWEET  
U.S.D.J.